80-1031

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MICHAEL RODAK, JR., CL

No. 80-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ARTHUR WAYNE BALDWIN, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

GREGORY B. CRAIG
WILLIAMS & CONNOLLY
1000 Hill Building
Washington, D.C. 20006
(202) 331-5036

Counsel of Record

CHARLES S. SIMS
BRUCE J. ENNIS
AMERICAN CIVIL LIBERTIES UNION
132 West 43rd Street
New York, New York 10036

Counsel for Petitioner

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

Arthur Wayne Baldwin petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

QUESTION PRESENTED

Whether petitioner's Fourth Amendment rights were violated when the government -- without a search warrant, without probable cause (or even reasonable suspicion) to believe that petitioner was engaged in the commission of a crime, in the absence of exigent circumstances, and for the express purpose of gathering evidence against petitioner -- placed an undercover police officer in the private employ of petitioner, and that police officer, over a period of six months, while working as a household handyman, chauffeur, and companion for petitioner's

son and while living in petitioner's residence, surreptitiously gathered evidence from petitioner's home for use against petitioner at trial.

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OPINIONS BELOW

The Order of the Court of Appeals denying the Motion for a Rehearing En Banc and Judge Jones' dissent (joined by Judge Keith) are unreported[1/] (Appendix A at 1a). The opinion of the Court of Appeals affirming the District Court's judgment is reported at 621 F.2d 251 (6th Cir. 1980) (Appendix B at 20a). The opinions of the District Court denying the defendant's Motion to Suppress issued on June 13, 1977 (Appendix C at 29a) and August 22, 1977 (Appendix D at 37a) are unreported.

JURISDICTION

The opinion of the Court of Appeals affirming the District Court's judgment

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1/ Chief Judge Edwards joined in dissent from denial of an en banc hearing "in view of the importance and difficulty of the issues." Appendix A at 18a.

below was entered on May 21, 1980. The Petition for Rehearing En Banc was denied on September 30, 1980. Justice Stewart issued an order on November 29, 1980 extending the date for the filing of this Petition for a Writ of Certiorari up to and including December 29, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution states:

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

Joseph Ross Hoing was secretly sworn in as an undercover police officer with the Memphis Police Department on April 29, 1974, receiving the same rank and pay as other Memphis patrolmen and vested with the same power and authority.

That same date, Officer Hoing was assigned to cover the petitioner, Arthur Baldwin, a newcomer to Memphis engaged in the business of running certain topless entertainment night spots known as The Playgirl Clubs. Although the Memphis Police Department had no probable cause or even reasonable suspicion to believe that Baldwin was involved in the commission of any crimes, Officer Hoing was instructed to place Baldwin under surveillance, to frequent The Playgirl Clubs, and to report back "what he saw every day, what you hear, whether it

was right or wrong, left or right." Tr. at 26.[2/]

In July, 1975, Officer Hoing learned that Baldwin's chauffeur had been fired and reported that fact to his superior. Although the Memphis police, after nearly fifteen months of surveillance, still lacked any reason to believe that Baldwin was engaged in any kind of illegal activity, Hearing Tr. at 15-16,[3/] Officer Hoing was instructed to make every effort to enter Baldwin's employ as his private driver. Tr. at 27. Hoing applied for the job, was interviewed by

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2/ References to the transcript of the trial of this case appear as "Tr. at ____."

3/ On June 10, 1977, the District Court held an evidentiary hearing on petitioner's Motion to Suppress. References to the transcript of that hearing appear as "Hearing Tr. at ____."

Baldwin, and began driving for Baldwin the very next day (July 11, 1975). That same day, Hoing moved in with Baldwin ("I just started staying with him." Tr. at 270), shared one of the two bedrooms in Baldwin's apartment with Baldwin's fourteen-year-old son, Wayne, and moved with Baldwin and his son from the apartment to a much larger residence in October, 1975.

Officer Hoing lived with Baldwin and his son from July 11, 1975 until December 1975. He reported on a daily basis to his superiors in the police department, who were fully aware of Hoing's activities living with and working for Arthur Baldwin. Hearing Tr. at 17. Officer Hoing's superiors in turn consulted with the Mayor of the City, the head City Attorney, the Attorney General's office, and the Office of the United States

Attorney as to the legality of Hoing's activities.[4/] Tr. at 24-25. No search warrant was ever sought or issued.

Hoing's tasks were those of a general household handyman as well as those of a driver. Hoing helped Baldwin in his move from apartment to house, in packing Baldwin's suitcase for trips, and in looking after Baldwin's son when Baldwin was out of town. The District Court found: "Hoing had the general run of defendant's house with [Baldwin's] permission and was essentially living in the defendant's house at the time of the

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4/ That these authorities apparently condoned Hoing's activities implies that this practice may well be commonplace or at least recurring.

involved seizures . . ."[5/] Appendix D at 39a.

Officer Hoing spotted a book that Baldwin was reading entitled "Cocaine and Its Uses" and also observed Baldwin inhaling a white powdery substance. Hoing's superiors instructed him to procure a sample. Hearing Tr. at 60; Tr. at 66. Hoing carried out his instructions by stealing some of the material from a small plastic bag that Hoing saw lying on the top of Baldwin's bedroom dresser. On two other occasions, Hoing collected

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5/ At the evidentiary hearing, Baldwin vehemently disputed Hoing's claim that Baldwin had given him general, unrestricted access to his (Baldwin's) bedroom as well as to the rest of the house. The District Court found, however, "[T]here seems to have been no reason why Baldwin would have directed Hoing not to enter his bedroom." Appendix C at 34a-35a.

two additional samples, one from a table top in Baldwin's bedroom and one from the back of Baldwin's automobile. All three samples were introduced into evidence at the trial over Baldwin's objection.

On August 22, 1977, the jury convicted Arthur Baldwin on three counts of simple possession of cocaine in violation of 21 U.S.C. § 844(a) and one count of possession with intent to distribute in violation of 21 U.S.C. § 844(a)(1). On March 23, 1979, the District Court suspended the imposition of sentence and placed the defendant on probation for a period of two years.

REASONS FOR GRANTING THE PETITION

This case poses the stark and unprecedented issue of whether the Fourth Amendment imposes any constraints on the activities of an undercover law enforcement officer who, without a search warrant and with no probable cause or even reasonable suspicion to believe that the subject of his investigation was engaged in criminal activity or that the subject's residence was being used for illicit purposes, inserts himself as a household employee in the subject's home and lives with the subject for a period of several months for the express purpose of conducting twenty-four hour surveillance of and gathering evidence against the targeted individual. We are aware of no case in which this Court has been confronted with a more pervasive and Orwellian intrusion by government authorities into the sanctity of

a private residence.[6/]

I. THE OPINION BELOW DECIDES AN IMPORTANT QUESTION OF FEDERAL LAW IN CONFLICT WITH THIS COURT'S DECISION IN GOULED v. UNITED STATES

The decision of the Court of Appeals conflicts with this Court's decision in Gouled v. United States, 255 U.S. 298 (1921).

In Gouled, a business acquaintance (Cohen) gained admission to the office of an individual (Gouled) suspected by the federal authorities of being engaged in a conspiracy to defraud the United States. Pretending to make a friendly social call,

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6/ The conduct of the law enforcement authorities in this case is every bit as obnoxious as that of the IRS agents in United States v. Payner, ___ U.S. ___, 100 S.Ct. 2439 (1980), except that Baldwin has none of Payner's standing problems. For that reason, an exercise of this Court's supervisory powers would be fully warranted here. See Mapp v. Ohio, 367 U.S. 643 (1960) and the cases cited at 100 S.Ct. at 2450-2451.

Cohen visited Gouled in his office under orders of law officers and for the purpose of gathering evidence. During the ensuing conversation, Gouled left his office for a moment, and, in his absence, Cohen seized and subsequently carried away several documents that were later introduced into evidence against Gouled at trial.

The government contended that an individual's Fourth Amendment rights are not violated "if an officer goes to the accused and asks and is granted permission to enter his house or his office." Once on the premises with the consent of the accused, the government argued, "the Constitution does not require [the officer] to shut his eyes to any evidence of crime that may be open to his observation." 255 U.S. at 301.

In a unanimous decision, this Court rejected the government's argument

and held Cohen's conduct unconstitutional. The Court reasoned that a warrantless seizure of evidence following entry obtained by stealth or deception is no less offensive to the Fourth Amendment than is the warrantless seizure of evidence following entry obtained "by an illegal threat or show of force, amounting to coercion," because "[t]he security and privacy of the home . . . would be as much invaded and the search and seizure would be as much against [the homeowner's] will in the one case as in the other, and it must therefore be regarded as equally in violation of his constitutional rights." 255 U.S. at 305-306.[7/]

7/ In Warden v. Hayden, 387 U.S. 294, 302-309 (1966), the Supreme Court overruled the "mere evidence" rule which appeared in Gouled. That rule stated that search warrants "may not be

(Footnote continued)

If the search and seizure condemned by the Supreme Court in Gouled failed to pass constitutional muster, surely the search and seizure in this case -- involving a far more intrusive penetration into a private residence over a longer period of time with even less cause -- must also be rejected as unconstitutional.

Without addressing Gouled, the Court of Appeals concluded that Officer Hoing's conduct did not offend the Constitution or violate Baldwin's Fourth Amendment

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(Footnote continued)

7/ used . . . solely for the purpose of making search to secure evidence to be used . . . in a criminal or penal proceeding." 255 U.S. at 309. (Papers were also taken from Gouled's office under two search warrants.) The heart of Gouled, however, deals with the impropriety of Cohen's warrantless search and seizure of documents from Gouled's office. Warden v. Hayden, supra, left that aspect of Gouled undisturbed.

rights because "[t]he Fourth Amendment does not protect wrongdoers from misplaced confidence in their associates," Hoffa v. United States, 385 U.S. 293 (1966); because "an agent may legitimately gain entrance into a house by misrepresenting his identity," Lewis v. United States, 385 U.S. 206 (1966); and because, once in Baldwin's residence, Officer Hoing's subsequent seizure of cocaine samples was simply a "gathering of evidence . . . in plain view," United States v. Hare, 589 F.2d 1291 (6th Cir. 1979). Appendix B at 24a-25a.

The panel's conclusion directly contradicts the general rule that, in the absence of exigent circumstances, a police officer must obtain a search warrant before searching a home and seizing evidence. Coolidge v. New Hampshire, 403 U.S. 443 (1971); Katz v. United States,

389 U.S. 347 (1967). The government has shown no exigent circumstances in this case that would eliminate the need for a search warrant. Vale v. Louisiana, 399 U.S. 30 (1970). Officer Hoing's presence in Baldwin's home was plainly unconstitutional, and his subsequent search of Baldwin's residence and seizure of evidence cannot be justified by the "plain view" doctrine. United States v. Jeffers, 342 U.S. 48 (1951).

The panel's heavy reliance on Hoffa and Lewis is mystifying in light of the fact that each of these cases expressly affirms Gouled v. United States. In Hoffa, the Court stated, with a citation to Gouled, that, "The Fourth Amendment can certainly be violated by guileful as well as by forcible intrusions into a constitutionally protected area." 385 U.S. at 301. And in Lewis, the Court stated

that an undercover agent's entry of a suspect's residence upon invitation and for the express purpose of consummating an illegal transaction "does not mean that, whenever entry is obtained by invitation . . . an agent is authorized to conduct a general search for incriminating materials; a citation to the Gouled case is sufficient to dispose of that contention." 385 U.S. at 211.

The Court of Appeals' reliance on Hoffa and Lewis is misplaced, however, for other, equally important reasons.

Hoffa differs from this case in at least two important respects. First, whereas Hoing was a total stranger to Baldwin, at least initially, the informant in Hoffa (Edward Partin) was a pre-existing friend and associate of Jimmy Hoffa's. Whereas Hoing was a Memphis patrolman specifically programmed by

Memphis law enforcement authorities to insinuate himself into Baldwin's private life, Partin, already Hoffa's confidante, agreed to cooperate with the police on his own initiative. 385 U.S. at 298-299. Placing an undercover policeman into a private residence under false pretenses to spy on the inhabitants, as occurred in this case, is quintessentially different from taking advantage of a malefactor's misplaced reliance on the trustworthiness of an accomplice, as occurred in Hoffa. One is a government-inspired and implemented intrusion into the sanctity of the home; the other involves the government benefitting innocently from a "wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." Id. at 302. The Hoffa Court explicitly

recognized the significance of this distinction when it noted that,

> "The applicability of the Fourth Amendment if Partin had been a stranger to the petitioner is a question we do not decide." 385 U.S. at 302 n. 6,

and cited Gouled with approval.

Second, Hoffa involved the unconcealed overhearing by Partin of conversations that were "either directed to him or knowingly carried on in his presence," 385 U.S. at 302, while this case involves the surreptitious removal of tangible evidence from Baldwin's bedroom. As Judge Jones observed about Hoffa and United States v. White, 401 U.S. 745 (1970):

> "These cases should be interpreted as making a participant in a conversation free to record or repeat it without having first to secure a warrant. The rationale for this approach is, I believe, a function of the nature of conversations. A conversation belongs equally to all participants. Thus, no one can have an expectation of privacy about the

> use of a conversation by a participant." Appendix A at 11a-12a.

The Court of Appeals' decision amounts to a dangerous extension of Hoffa. Nothing in Hoffa suggests that the Supreme Court intended the "misplaced reliance" doctrine to be a declaration of independence from the Fourth Amendment for undercover policemen; and there is nothing in Hoffa (or any other case) to support broadening the narrow exception to the Fourth Amendment accorded the warrantless "seizure" of a conversation by one of its participants to include the warrantless seizure of other kinds of evidence. See, e.g., United States v. White, supra, 401 U.S. at 752.

The Court of Appeals' resort to Lewis v. United States, supra, is similarly inapposite.[8/] In Lewis (unlike here), there was no search; the subject handed the marijuana to the undercover agent on the porch. More importantly, in Lewis (unlike here), the undercover agent was explicitly invited into the subject's home for the pre-arranged and mutually understood purpose of committing a crime. In Lewis, the intrusion was limited to a single entry of a home which had been "converted into a commercial center to

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8/ In Lewis, a federal narcotics undercover agent, on a tip, telephoned the subject's residence to inquire about the possibility of purchasing marijuana. After identifying himself as "Jimmy the Pollack", the agent was told, "Yes, I believe, Jimmy, I can take care of you." The agent was invited to the subject's house where, after introducing himself, he purchased marijuana from the subject.

which outsiders [were] invited for purposes of transacting unlawful business." The Court found that, in such circumstances, "that business is entitled to no greater sanctity than if it were carried on in a store, a garage, a car or on the street." 385 U.S. at 211. In addition, the "seizure" of the marijuana in Lewis occurred in connection with the "very purposes [of the visit] contemplated by the occupant," id, and resulted in no intrusion upon the privacy of the household.

It is one thing for an undercover policeman to enter a residence with the certain, advance knowledge that he is there to witness the commission of a crime; it is entirely different for the police to insert an undercover agent into a private residence in the guise of a long-term household employee for the purpose of engaging in a perpetual roving

commission to discover whether or not the homeowner is engaged in crime. Baldwin invited Hoing into his home to assist him in a variety of unexceptional, if not mundane, tasks. Unlike the agent in Lewis, Hoing was not invited in to engage in illegal trade or to commit a criminal offense.[9/]

Neither Lewis nor Hoffa can fairly be read to sanction the kind of prolonged undercover fishing expedition conducted

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9/ The government can find little comfort in Lewis and Hoffa for yet another reason. With respect to undercover police activity generally, the Lewis Court noted that no hard and fast rules could be drawn: "[T]he particular circumstances of each case govern the admissibility of evidence obtained by strategem or deception." 385 U.S. at 208. Similarly, in Hoffa the Court cautioned, "By nothing we say here do we either foresee or foreclose factual situations to which the Fourth Amendment may be applicable." 385 U.S. at 301-302.

by the Memphis Police Department in this case. And because Hoing's presence in Baldwin's home was, in the first instance, unconstitutional, the "plain view" doctrine simply does not come into play.

II. THE DECISION BELOW IS IN CONFLICT WITH THE PRINCIPLES AND APPROACH OF PAYTON v. NEW YORK.

The Court of Appeals' decision in this case is wholly inconsistent with the principles and approach adopted by this Court in Payton v. New York, 445 U.S. 573 (1980). There the Court struck down a New York State statute permitting the police to make a warrantless, nonconsensual entry into a suspect's home for the purpose of carrying out a felony arrest. And the Court suppressed certain incriminating evidence found "in plain view" in the course of two such actions. The

Supreme Court's own analogy -- comparing warrantless entries for the purpose of carrying out a search (this case) with warrantless entries to make an arrest (Payton)[10/] -- makes the logic and language of Payton all the more applicable to the conduct at issue here. The Court stated:

> "The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home -- a zone that finds its roots in clear and

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10/ The Court observed that,

> "[A]ny differences in the intrusiveness of entries to search and entries to arrest are merely ones of degree rather than kind. The two intrusions share this fundamental characteristic: the breach of the entrance to an individual's home." 445 U.S. at 589.

> specific constitutional terms: 'The right of the people to be secure in their . . . houses . . . shall not be violated.' That language unequivocally establishes the proposition that '[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.' Silverman v. United States, 365 U.S. 505, 511. In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." Id. at 589-590 (emphasis added).

If applied generally, the decision by the Court of Appeals would exempt virtually all undercover activity, no matter how pernicious, from the reach of the Fourth Amendment. More particularly, if Officer Hoing's invasion of Arthur Baldwin's home is upheld, the Fourth Amendment stands a fair chance of being seriously crippled if not wholly vitiated.

The path to successful circumvention will be clear and unmistakable. Conduct that the Fourth Amendment would sharply condemn if carried on directly and openly by law officers would hereafter be countenanced if accomplished by ruse, stealth and trickery.[11/]

In Katz, supra, 407 U.S. at 359, this Court wrote, "Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures." Four years later, the Court added that the "physical entry of the home is the chief evil against which

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11/ It is inconceivable that the Fourth Amendment could provide less protection against the ruses and devices of ingenious police officers for the citizen in the privacy of his or her home than does the Sixth Amendment for a defendant's relationship with his attorney. See, United States v. Henry, ___ U.S. ___, 100 S. Ct. 2183 (1980).

the wording of the Fourth Amendment is directed."[12/] And just this year, the Court wrote:

> "[N]either history nor this Nation's experience requires us to disregard the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic." Payton v. New York, supra, 445 U.S. at 601.

To forestall a betrayal of those traditions, this Court should review the decision of the Court of Appeals in this case.

12/ United States v. United States District Court (Keith), 407 U.S. 297, 313 (1971).

CONCLUSION

A writ of certiorari should be issued to review the judgment below.

Respectfully submitted,

Gregory B. Craig
Williams & Connolly
The Hill Building
Washington, D.C. 20006
(202) 331-5036
Counsel of Record

Charles S. Sims
Bruce J. Ennis
American Civil Liberties Union
132 West 43rd Street
New York, New York 10036
Counsel for Petitioner

Dated:
Washington, D.C.
December, 1980

APPENDIX

Appendix A

No. 79-5128

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee v. ARTHUR WAYNE BALDWIN, Defendant-Appellant	)	O R D E R

Before: KENNEDY and MARTIN, Circuit Judges; PECK, Senior Circuit Judge.

The decision in this case is reported at 621 F.2d 251 (6th Cir. 1980). A motion to reconsider the case has been filed along with a request that the active judges of the circuit be polled to consider rehearing the case en banc. Rule

35, Federal Rules of Appellate Procedure. A majority of the circuit having considered and voted against en banc and the panel having reviewed the motion to reconsider, it is hereby ordered that both motions be denied.

ENTERED BY ORDER OF THE COURT

s/ _____
Clerk

No. 79-5128, UNITED STATES OF AMERICA v. ARTHUR WAYNE, BALDWIN JONES, Circuit Judge, dissenting, in which KEITH, Circuit Judge, joins. A majority of this court has denied plaintiff's petition to rehear this case en banc. Because I believe the panel's decision is contrary to the requirements of the Fourth Amendment, I dissent from the denial of the petition.

I. INTRODUCTION

The government secreted a police officer in the legitimate employ of the appellant Baldwin. This policeman, while employed in the home of appellant, proceeded to secure from the residence several samples of cocaine without Baldwin's knowledge or consent.

The central issue is whether the government is required to secure a search warrant in order to place an undercover

agent as an employee, in a private home, for a period of several months. The panel upholds the district court's ruling that the seizure of these samples was constitutional because the agent was "lawfully" present and the evidence seized was in "plain view." By implication the panel further holds that the discovery and seizure of the evidence was inadvertent.

I believe that the panel's decision errs in its application of the "plain view" doctrine and in its holding that Baldwin consented to the presence of the undercover agent in his home. As a result, the panel's decision expands the circumstances in which a search warrant is not required. Such an expansion collides with the Fourth Amendment's guarantee to citizens of security "in their persons, houses, papers, and effects, <u>against</u> unreasonable searches and seizures" and its

protection "of the sanctity of man's home and the privacies of life." Boyd v. United States, 116 U.S. 616, 630 (1886).

It was the clear design and attempt of the government to conduct surveillance on Baldwin's activities and to seize evidence within his home. There is no evidence in the record that Baldwin waived his rights to the security of his home. In short, the panel's reasoning is unpersuasive, because the initial entry by the undercover agent into Baldwin's home was unconstitutional. Consequently, the subsequent search and seizure within his home cannot be justified by the "plain view" doctrine. United States v. Jeffers, 342 U.S. 48 (1951).

II. WARRANT REQUIREMENT

The general rule is that a police officer must obtain a search warrant before

searching a home and seizing evidence. Coolidge v. New Hampshire, 403 U.S. 443 (1971); Katz v. United States, 389 U.S. 347 (1967); Gouled v. United States, 255 U.S. 298 (1921). A warrant is unnecessary only rarely when the government can show exigent circumstances of constitutional magnitude. Vale v. Louisiana, 399 U.S. 30 (1970). The government, in my view, has not shown an exigent circumstance that would eliminate the need for a search warrant. The Supreme Court said almost 60 years ago:

> [W]hether entrance to the home or office . . . be obtained by a representative . . . of the government . . . by stealth . . . or in the guise of a business call, and whether the owner be present or not when he enters, any search and seizure subsequently and secretly made in his absence falls within the scope of the prohibition of the Fourth Amendment.

Gouled v. United States, 255 U.S. 298, 306 (1921) (emphasis added). Gouled continues

to stand as good law. In approving the use of informants to report conversations in which they participated, the court cites Gouled as an example of impermissible guileful activity. Hoffa v. United States, 385 U.S. 293, 301 (1966). Similarly the court in approving the seizure of drugs involved in a drug transaction expressly distinguishes Gouled. Lewis v. United States, 385 U.S. 206, 210 (1966). The court said in Lewis:

> But when, as here, the home is converted into a commercial center to which outsiders are invited for purposes of transacting unlawful business, that business is entitled to no greater sanctity than if it were carried on in a store, a garage, a car, or on the street. A government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purposes contemplated by the occupant. Of course, this does not mean that, whenever entry is obtained by invitation

> and the locus is characterized as a place of business, an agent is authorized to conduct a general search for incriminating materials; a citation to the Gouled case, supra, is sufficient to dispose of that contention.

Id. at 211 (emphasis added). In Lewis agents did not search the home and only introduced as evidence the specific drugs purchased in the transaction at the defendant's home. Baldwin did not invite anyone in for illegal trade or business.

In sum, the Supreme Court has held that agents may not secretly invade the home of a private citizen without a warrant. Since there clearly was such an invasion in this case, the evidence was illegally seized.

III. ENTRY BY RUSE

The Supreme Court has held that, in order to effectuate a purchase of illegal substances, agents may gain entry by a

ruse. Lewis v. United States, 385 U.S. 206 (1966). The panel extends this rule to the entry of a police officer for a legitimate purpose (in this case employment as a handyman and chauffeur). Under the rule proposed by the panel, the Memphis police officer could pose as a plumber, electrician, or phone company representative and, having lawfully secured entry seize evidence which was in "plain view." Unless Fourth Amendment protections are applied, the police could target specific individuals for any reason and secure entry in the hope of finding incriminating evidence, e.g., it is not impossible to think of law enforcement officials targeting "unpopular" judges, politicians or private individuals. I do not believe the Fourth Amendment would permit a policeman to gain such employment and in the course of that

employment conduct a search and seize evidence in "plain view."

The Supreme Court has held that OSHA agents may not make safety checks of non-public parts of a business without securing a search warrant. Marshall v. Barlow's, Inc., 436 U.S. 307 (1978). I do not believe that we could permit these OSHA agents to gain entry by securing employment through a ruse and thereby find OSHA violations in "plain view," without such an intrusion violating the Fourth Amendment. Similarly, the Internal Revenue Service cannot hire its agents out as income tax consultants and seize evidence in plaintiff's records as being in "plain view." Yet that is where we are led by the panel's opinion in this case.

Two lines of precedent may seem to support the panel's opinion but upon close

examination it is clear they do not. First are the cases in which the government has secreted agents into the homes of defendants in order to record their conversations or to have the informant repeat them. United States v. White, 401 U.S. 745 (1971); Hoffa v. United States, 385 U.S. 293 (1966). These cases mark a narrow exception to the general rule that without a warrant the government may not intrude anywhere that a citizen has an expectation of privacy. United States v. Katz, 389 U.S. 347 (1967).[1/] These cases should be interpreted as making a participant in a conversation free to record or repeat it without having first to secure a warrant. The rationale for this approach is, I believe, a function of the nature of conversations. A conversation belongs equally to all participants. Thus, no one can

have an expectation of privacy about the use of a conversation by a participant.

Nothing in White or Hoffa supports an extension beyond conversations to other kinds of seizures of evidence. First, as noted before, Hoffa explicitly reaffirms the soundness of Gouled. Second, after Katz, Hoffa must be read in its narrowest terms. Though Katz did not overrule Hoffa, Katz sets forth a heightened concern about privacy interests protected by the Fourth Amendment. Hoffa, merely permits the use of informants in carefully defined circumstances.

Second, we must distinguish the situation in which a defendant invites an undercover agent into his home for an illegitimate activity. In this situation, the government agents have probable cause to believe that a crime is about to be

committed. It is impossible for them to refuse admittance and to seek a search warrant. Coolidge v. New Hampshire, 403 U.S. 443 (1971). The seizure of evidence takes place shortly after the illegal transaction occurred, and the agent or police officer involved is present. Lewis v. United States, 385 U.S. 206 (1966) (purchase of drugs by an agent); United States v. Glassel, 488 F.2d 143 (1973), cert. denied, 416 U.S. 941 (1974) (agent went into home to purchase drugs). None of these circumstances is present here. A person who employs someone for a legitimate purpose does not give the undercover police officer or agent probable cause to believe that crime is in progress. There is no reason for permitting the government to intrude into the privacy of an individual's home without that probable cause.

If there are other circumstances which would constitute probable cause and necessitate intrusion into a defendant's home, police officers can secure a search warrant.

The panel does cite one case, United States v. Raines, 536 F.2d 796 (8th Cir. 1976), cert. denied, 429 U.S. 925 (1976), which states in dicta a rule inconsistent with this approach. In Raines, a federal agent posing as a friend of defendant's associate who was jailed gained entry to the defendant's apartment. However, even in this case the agents did not secure any evidence which was supposedly in "plain view." The defendant turned over to the agents the evidence with apparent consent. Thus, the panel's view of the scope of the Fourth Amendment approves a new and more dangerous government intrusion into the

privacy granted individuals by the Constitution.

IV. "PLAIN VIEW"

The panel, in my opinion, also errs in its application of the "plain view" doctrine. The "plain view" doctrine requires, first, that the initiation of the search be justified. As discussed above, I would hold that the undercover agent's entry and continued presence in Baldwin's home was unlawful. Second, under the "plain view" doctrine, the discovery of the evidence must be inadvertent. Coolidge v. New Hampshire, 403 U.S. 443 (1971).

The courts have consistently held that police and government agents cannot circumvent this rule by maneuvering evidence into "plain view." United States v. Hare, 589 F.2d 1291 (6th Cir. 1979); Fankboner v. Robinson, 391 F. Supp. 542 (W.D.

Va. 1975), rev'd on other grounds without opinion sub nom., 538 F.2d 324 (4th Cir. 1976). In Hare a panel of this Circuit interpreted inadvertent action as unintentional action. In my view when the undercover police officer secreted himself in the employ of a private citizen to gain entry into his home, the undercover police officer was intentionally maneuvering the evidence into "plain view." It also appears that the police officers could have secured a search warrant, but did not, in violation of the Fourth Amendment. Coolidge v. New Hampshire, 403 U.S. 443 (1971). It is inconceivable that the "plain view" principle, which is premised on the presence of exigent circumstances, could justify the seizure of evidence by an undercover agent who had been living in Baldwin's home for several months. This

unlimited and unchecked invasion of Baldwin's privacy makes compelling the need for judicial supervision by means of a search warrant. This term the Supreme Court said "the Fourth Amendment has drawn a firm line at the entrace to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." Payton v. New York, ___ U.S. ___ (1980) (emphasis added). If we apply that general principle to this case, I do not believe the panel's view of this intrusion on Baldwin's rights can withstand scrutiny.

V.

I fear that the court's holding deprives persons of their constitutional rights once the government places the label of "suspect" upon them. In order to meet the Fourth Amendment's requirements of

reasonableness, I am convinced that police must obtain a search warrant in order to plant an agent as a household employee or in other legitimate activities in order to seize evidence in anyone's home. In addition, agents may have to secure search warrants in order to seize any piece of evidence. Such a rule would be consistent with the cases which permit police officers to seize evidence in "plain view" without adopting a rule which severely limits the scope of the Fourth Amendment. This proposed rule would not inhibit the legitimate undercover activities of the police.

Chief Judge Edwards has authorized me to say that in view of the importance and difficulty of the issues in this appeal, he joins in dissent from denial of an en banc hearing.

Accordingly, I respectfully dissent.

FOOTNOTE

1/ For a thorough discussion of the expectation of privacy issue see United States v. Bailey, No. 79-5092 Slip. Op. (6th Cir., July 31, 1980) (Judge Celebrezze, Keith and Phillips).

Appendix B

NO. 79-5128

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee	)
	)
v.	)
	)
ARTHUR WAYNE BALDWIN,	)
	)
Defendant-Appellant	)
	)
	)

Before: KENNEDY and MARTIN, Circuit Judges; and PECK, Senior Circuit Judge.

BOYCE F. MARTIN, Jr., Circuit Judge.

Arthur Wayne Baldwin appeals from a jury conviction on three counts of possession of cocaine and one count of possession with intent to distribute cocaine.

These offenses are set out in 21 U.S.C. §§ 844(a) and 841(a)(1), respectively. Baldwin contends that the government's evidence, gathered by an undercover police agent, was obtained in violation of the Fourth Amendment's search and seizure provision. We disagree and affirm the convictions.

In 1975, the Memphis, Tennessee Police Department assigned Joseph Hoing the duty of conducting surveillance of Baldwin and the local nightclubs he operated. Pursuant to this assignment, Hoing gained Baldwin's confidence and obtained employment as Baldwin's chauffeur and general handyman. Hoing acted in this capacity from July, 1975 until Baldwin's imprisonment for tax evasion in December, 1975. Hoing also worked at Baldwin's Playgirl Clubs, first as a bartender and

later as a club manager. Between July and October, 1975, Baldwin and Hoing shared a two-bedroom apartment. When Baldwin moved to a house, Hoing occupied a downstairs bedroom. Hoing testified that he had free access to all parts of both residences, including Baldwin's bedroom.

In the course of their association, Hoing observed Baldwin use and distribute a white powder which Hoing believed to be cocaine. On four occasions, Hoing obtained samples of this powder, subsequently identified as cocaine by the police laboratory. The first two samples came from a tabletop in Baldwin's bedroom. Hoing found the third while cleaning the floorboard of Baldwin's automobile, part of his job as chauffeur. He retrieved the fourth sample when Baldwin instructed him to bring some "coke" from a dresser drawer to

one of the nightclubs. Three of these samples were introduced into evidence, over Baldwin's objections. The trial judge conducted a hearing on Baldwin's motion to suppress and issued a memorandum and order denying the motion.

On appeal, Baldwin argues that the manner in which the government obtained evidence against him violated the Fourth Amendment. By analogy to the rules governing the use of electronic surveillance, he contends that Hoing's undercover activities, including his seizure of cocaine samples, were illegal in the absence of a search warrant. We disagree. Neither the defendant's brief nor our own research has revealed any precedent to support the suggestion that the Fourth Amendment requires law enforcement agencies to seek prior judicial approval in the form of a

warrant before utilizing an undercover agent.

Baldwin emphasizes throughout his argument that he never consented to the presence of a "police spy" in his home The Fourth Amendment, however, does not protect wrongdoers from misplaced confidence in their associates. Hoffa v. United States, 385 U.S. 293, 87 S. Ct. 408, 17 L.Ed.2d 374 (1966). On the contrary, an agent may legitimately gain entrance into a house by misrepresenting his identity. Lewis v. United States, 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed.2d 312 (1966). The fact that Baldwin would not knowingly have invited a police agent to share his house does not render Hoing's presence there illegal. We are not inclined to disturb the trial judge's ruling that Hoing did not exceed his authority when

he entered Baldwin's bedroom or swept out Baldwin's car.

If we accept the legality of Howing's undercover activites generally, we must still determine whether or not his seizure of cocaine samples violates the Fourth Amendment. Our cocaine samples violates the Fourth Amendment. Our analysis begins with a basic constitutional rule:

> Searches conducted outside the judicial process, without prior approval by judge or magistrate are per se unreasonable under the Fourth Amendment - subject only to a few specifically established and well-delineated exceptions.

Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1067). The "plain view" doctrine is one such exception. United States v. Hare, 589 F.2d 1291 (6th Cir. 1979). On three occasions

Hoing confiscated cocaine that was in "plain view" on a tabletop and the floor of a car. Those seizures were well within the rule of Hare, supra. Hoing obtained the fourth sample pursuant to Baldwin's specific instructions to bring him some cocaine. There is no evidence that Hoing ransacked Baldwin's personal belongings in his search for contraband. Lewis v. United States, supra.

Two leading cases support our conclusions. United States v. Glassel, 488 F.2d 143 (9th Cir. 1973), cert. denied, 416 U.S. 941, 94 S.Ct. 1945, 40 L.Ed.2d 292 (1974), and United States v. Raines, 536 F.2d 796 (8th Cir.), cert. denied, 429 U.S. 925, 97 S.Ct. 327, 50 L.Ed.2d 293 (1976). In Glassel, a police informer and an undercover narcotics agent negotiated the sale of cocaine with the

defendant. They were invited into a house where Glassel met them and agreed to exchange the drugs. The court rejected Glassel's fourth amendment argument and upheld the seizure of cocaine. In Raines, an agent posed as a friend of a drug dealer who had already been arrested. In this guise, the agent was invited into Raines' home to explain to him what had happened to their "mutual friend." The agent then revealed his true identity and informed Raines that he believed marked currency and drugs were on the premises. The Court upheld Raines' arrest and the agent's seizure of contraband.

In summary, Baldwin cannot invoke the protection of the Fourth Amendment to invalidate his convictions. Hoing's presence in the Baldwin household was legal, as was his gathering of evidence which was

invalidate his convictions. Hoing's presence in the Baldwin household was legal, as was his gathering of evidence which was in plain view. Accordingly, the judgment of the district court is affirmed.

APPENDIX C

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TENNESSEE

UNITED STATES OF AMERICA,	)	
	)	
v.	)	Cr. No. 77-20011
	)	
ARTHUR WAYNE BALDWIN,	)	
	)	
Defendant	)	
	)	
	)	

MEMORANDUM DECISION AND ORDER
DENYING MOTION TO SUPPRESS

This cause is before the Court on the motion of the defendant Baldwin to suppress certain evidence obtained by the Government which is claimed by the Government to be cocaine. An evidentiary hearing has been held at which witnesses testified

for the parties. The evidence that is sought to be suppressed was obtained by an officer of the Memphis Police Department working in an undercover capacity.

It appears that Joe Hoing became an officer in the Memphis Police Department in April 1974 and was assigned an undercover capacity at the time he became an officer. As part of his job, Hoing began to frequent the Playgirl Clubs here in Memphis which were owned and operated by the defendant Baldwin. Hoing first met Baldwin in May of 1974 and, on recommendation of one of Baldwin's bartenders, Hoing went to work for Baldwin as a chauffeur and handyman in July of 1975. At the time, Baldwin had three or four automobiles to be looked after and also appears to have had custody of his fourteen year old son who also had to be looked after. Hoing,

as part of his job, not only acted as chauffeur for Baldwin but also ran errands and kept company with Baldwin's son.

In July of 1975, Baldwin took an apartment on Raines Road here in Memphis which was occupied, in addition to himself, by his girl friend or common law wife, one Kathy Davis, by the son, Wayne Baldwin, and, acocording to Hoing, by Hoing himself. While Baldwin and Kathy Davis denied that Hoing actually lived in the apartment, it is without dispute that, as part of his job, Hoing was required to be in and around the apartment a great deal of the time between July of 1975 and October 1, 1975, on which latter date Baldwin moved to a house.

When Baldwin moved to the house, also in Memphis, it, again, was occupied by, in addition to Baldwin himself, Kathy Davis

and his son, Wayne, and, according to Hoing, by Hoing himself. Baldwin and Davis deny that Hoing lived there for more than a very short period, but it is without dispute that his work required him to come and go from the house on many occasions and daily.

One of the samples claimed to be cocaine was obtained by Hoing from Baldwin's apartment on Raines Road, specifically from the top of a dresser in his bedroom. Hoing testified that he entered the bedroom while Baldwin was taking a shower for the purpose of talking to him, and saw a white powdered substance lying on the dresser, and he therefore took a sample of it. Another sample was obtained from the house, which was on Viking Road, in October of 1975. Hoing testified that, while standing in the door of the large master

bedroom in which Baldwin and Davis slept, he saw a plastic baggy which appeared to have powder on it on a dresser, and therefore he took a sample of it. The third sample was obtained by Hoing, he testified, when requested by Baldwin to clean some trash out of the back end of Baldwin's automobile; while this sample appears to be covered by the motion to suppress, it was not contended at the hearing that such was suppressible. In any case, there appears no ground to suppress it as will be seen.

As we understand Baldwin's contention, it is that if, as he testified, Hoing entered the bedroom in the apartment on Raines Road or entered the bedroom in the house on Viking Road, he did so without authority and against the express direction from Baldwin. Thus, it is contended

by Baldwin, the seizure of the samples was illegal because Hoing had no consent from Baldwin to be where he was at the time he obtained the samples. (While Baldwin does not make a separate contention that Hoing did not have reasonable cause to believe that the substances he seized were cocaine, it appears clear that he did have such reasonable cause.)

The Court has reached the conclusion that, in view of the nature of Hoing's employment, it is unreasonable to believe that he did not have the run of both the apartment on Raines Road and the house on Viking Road. Certainly his employment was extremely general, being both a chauffeur and handyman, and his work seems to have taken him throughout both places of abode. Moreover, there seems to have been no reason why Baldwin would have directed Hoing

not to enter his bedroom. The proof is undisputed that Baldwin, in Hoing's presence, used cocaine openly and on one occasion sent Hoing on a mission to go to the home and pick up some cocaine for Baldwin. Still further, the proof is also without dispute that neither the apartment on Raines Road nor the house on Viking Road were kept locked so that there does not appear to have been any attempt on the part of Baldwin generally to maintain secrecy with respect to such abodes. And, of course, with respect to the sample obtained while cleaning out the automobile, it was Hoing's specific job to do this kind of work.

As a further indication of the relationship between Baldwin and Hoing and to support Hoing's contention that he had the run of both abodes, shortly after these

events, when it became necessary for Baldwin to enter a federal institution as the result of an income tax fraud conviction in the State of Washington, Hoing was made president of the corporation that owned Baldwin's Playgirl Clubs.

Accordingly, it is the finding and conclusion of the court that Hoing had reasonable cause to believe that the powders he observed were cocaine and that, at the time he seized the samples, he was in position to see these powders with the consent of defendant Baldwin.

It is therefore ORDERED that the motion to suppress be and the same is hereby denied.

ENTER this 13th day of June, 1977.

/s/ _____
BAILEY BROWN
CHIEF JUDGE.

APPENDIX D

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TENNESSEE

UNITED STATES OF AMERICA,	)	
	)	
v.	)	Cr. No. 77-20011
	)	
ARTHUR WAYNE BALDWIN,	)	
	)	
Defendant	)	
	)	
	)	

MEMORANDUM

In this case, a pretrial motion was filed to suppress certain evidence and this Court entered a memorandum decision and order denying the motion to suppress on June 13, 1977. As will be seen from the memorandum, the basic contention of the defendant was that the undercover

policeman, Hoing, did not have the defendant's permission or consent to be where he was at the time he seized the sample alleged to be cocaine. This court concluded, as reflected by the memorandum decision, that Hoing did have such consent and therefore denied the motion to suppress.

During the trial, defendant renewed the motion to suppress based on the contention, in addition to that above discussed, that even if Hoing did have the defendant's permission or consent the seizure of the samples without a warrant was an invalid seizure, basing this claim primarily on Gouled v. United States, 65 L.Ed. 298. The Government, in turn, relied on United States v. Glassel, 488 F.2d 143 (9th Cir. 1973) and United States v. Raines, 536 F.2d 796 (8th Cir. 1976).

While this question is not without difficulty, this Court concluded at the time the matter was presented during the trial and still is of the opinion that the evidence should not be suppressed. We believe that the circumstance presented here can be distinguished from that in Gouled in the important respect that here the undercover policeman, Hoing, had the general run of defendant's house with his permission and was essentially living in the defendant's house at the time of the involved seizures. Moreover, while as an undercover policeman, Hoing was instructed to and did have his eyes and ears open with respect to criminal activity, at the time he came upon the white powder from which he seized the samples, he was not conducting a search and therefore, it would seem that the seizures would come

within the "plain view" exception. Further, it should be emphasized that there was no evidence that the undercover policeman, Hoing, was ransacking for evidence at the time he came upon the white powders from which he took the samples.

For completeness, we point out that one of the samples was taken from a bag which was among refuse on the floor of defendants' automobile that Hoing was requested, as chauffeur, to clean up and throw away. All we have said with respect to the other two samples would apply, a fortiori, to this situation.

The motion to suppress was therefore denied as reflected by the record at the trial.

ENTER this 22 day of August, 1977.

/s/ _____
BAILEY BROWN
CHIEF JUDGE